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THAT ONE VIDEO ENTERTAINMENT, LLC, a  
California limited liability company

**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

THAT ONE VIDEO  
ENTERTAINMENT, LLC, a  
California limited liability company,

Plaintiff,  
vs.

KOIL CONTENT CREATION PTY  
LTD., an Australian proprietary  
limited company doing business as  
NOPIXEL; MITCHELL CLOUT, an  
individual; and DOES 1-25, inclusive,

Defendants.

CASE NO: 2:23-cv-02687 SVW (JCx)

[Assigned to the Hon. Stephen V. Wilson;  
Ctrm 10A]

**PLAINTIFF'S RESPONSE IN SUPPORT  
OF ITS MOTION FOR SUMMARY  
ADJUDICATION; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

*[Objections to the Declarations of Larry  
Zerner, Mitchell Clout and Garry Kitchen;  
and [Proposed] Order Regarding the Same  
Filed Concurrently Herewith]*

**Hearing**

Date: September 9, 2024  
Time: 1:30 p.m.  
Dept.: Courtroom 10A (10th Floor)  
350 W. First Street  
Los Angeles, CA 90012  
Judge: Hon. Stephen V. Wilson

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff THAT ONE VIDEO ENTERTAINMENT, LLC, a California limited  
3 liability company (“TOVE” or “Plaintiff”) hereby submits this response in support  
4 of Plaintiff’s Motion for Summary Adjudication of Plaintiff’s First Cause of Action  
5 for Declaratory Relief in the First Amended Complaint (“FAC”), on the grounds set  
6 forth below (the “Response”).

7 **I. INTRODUCTION**

8 Defendants KOIL CONTENT CREATION PTY LTD., an Australian  
9 proprietary limited company doing business as NOPIXEL and MITCHELL  
10 CLOUT, an individual (collectively, “Defendants”) can only attempt to minimize  
11 Mr. Tracey’s contributions to the NoPixel Server, and distract from the fact that Mr.  
12 Tracey was an employee at the time he rendered development services for  
13 Defendants. But Defendants’ attempts to minimize Mr. Tracey’s contributions are  
14 not persuasive, *and under any calculation of his services* Mr. Tracey contributed  
15 more than a modicum of creativity to the NoPixel Server source code. Furthermore,  
16 it makes no difference what TOVE represented regarding Mr. Tracey’s employment  
17 with TOVE to anyone – so long as Mr. Tracey was an employee in California, all of  
18 the results and proceeds in the course of such employment were owned by TOVE.

19 Accordingly, TOVE’s Motion for Summary Adjudication of its First Cause of  
20 Action for Declaratory Relief should be granted, and TOVE must be permitted to  
21 conduct an accounting of its share of the profits derived from the exploitation of the  
22 NoPixel Server immediately.

23 **II. DEFENDANTS’ OPPOSITION FAILS TO INCLUDE A SEPARATE**  
24 **STATEMENT OF GENUINE DISPUTES**

25 California Local Rule (“L.R.”) 56-2 requires any party who opposes a motion  
26 for summary judgment or partial summary judgement to “serve and file with the  
27 opposing papers a separate ‘Statement of Genuine Disputes’ setting forth all  
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1 material facts as to which it is contended there exists a genuine dispute necessary to  
2 be litigated.” Defendants have failed to file and serve any such separate statement,  
3 thereby preventing TOVE from submitting its own response thereto, as required by  
4 L.R. 56-3. *See* Dkt. No. 53. Defendants’ Opposition must therefore be rejected.

5 **III. SUMMARY ADJUDICATION MUST BE GRANTED AS TO TOVE’S**  
6 **FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF**  
7 **BECAUSE MR. TRACEY WAS A JOINT AUTHOR**

8 Notably, Defendants do not dispute that the back-end source code of the  
9 NoPixel Server at issue in this dispute is entitled to copyright protection. *Integral*  
10 *Dev. Corp. v. Tolat*, 675 F. App’x 700, 704 (9th Cir. 2017). Instead, Defendants  
11 attempt (unsuccessfully) to undermine Mr. Tracey’s role as a joint author in the  
12 development of such source code by ignoring key aspects of the facts that  
13 indisputably support TOVE’s first claim for Declaratory Relief. However, TOVE  
14 has presented facts establishing each of the factors enumerated in *Alamuhammed v.*  
15 *Lee* 202 F.3d 1227 (9th Cir. 2000), and its Motion must therefore be granted.

16 **A. Mr. Tracey Is A Joint Author Based On His Contributions**

17 1. **Mr. Tracey Exercised Control Over His Services On The**  
18 **NoPixel Server**

19 Despite clear evidence to the contrary, Defendants now disingenuously deny  
20 their previous endorsement of Mr. Tracey as a lead developer. Defendants  
21 summarily claim that Mr. Tracey lacked control by attempting to argue that he was  
22 “one of dozens of contributors to the NoPixel [S]erver.” Opposition at 9:10-11. But  
23 by Defendants’ own admission, Mr. Tracey was able to “provide[ ] assistance in  
24 building in-game mechanics and approving development ideas and/or bounties if  
25 [Defendant Clout] was unavailable to do so.” Plaintiff’s Separate Statement of  
26 Undisputed Material Facts (“UMF”) at ¶ 38. Mr. Tracey also had the authority to  
27 delegate code-writing tasks to other developers, and was responsible for managing  
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1 their work. *Id.* at ¶ 37. Moreover, Defendants cannot dispute that Defendant Clout  
2 supported Mr. Tracey’s visa application by stating that Mr. Tracey played a “lead  
3 and critical role” in the development of the NoPixel Server. *Id.* at ¶ 51.

4 Accordingly, Mr. Tracey absolutely “superintended the work,” and his  
5 termination in no way negates the control he exhibited and the work he contributed  
6 to establish his status as a joint author. *Alamuhammed*, 202 F.3d at 1235. Because  
7 “control in many cases will be the most important factor,” Mr. Tracey’s control of  
8 the NoPixel server as lead developer supports the indisputable fact that Mr. Tracey  
9 is a joint author of the NoPixel Server. *Id.* at 1234.

10 2. Mr. Tracey and Defendants Objectively Manifested A  
11 Shared Intent To Be Co-Authors In His Contributions

12 Similarly, here, Defendants ignore the clear evidence indicating the parties’  
13 shared intent to be co-authors. Defendants and Mr. Tracey’s two-year working  
14 relationship culminated in Defendant Clout offering Mr. Tracey fifty percent (50%)  
15 of all revenue derived from NoPixel’s operation of the NoPixel Server. UMF ¶ 50.  
16 Defendants also allowed Mr. Tracey to exercise control as lead developer in  
17 supervising the work of other developers, especially when Defendant Clout was  
18 “unavailable to do so.” UMF ¶¶ 37-38.

19 Defendants try to focus on Mr. Tracey’s testimony during his deposition,  
20 wherein he stated that he owned the copyright. But any such statements merely  
21 amount to an inadmissible legal conclusion. The parties’ actions (namely, working  
22 together to develop the NoPixel Server, and providing Mr. Tracey with the freedom  
23 and control to do so), objectively manifested their intent for Mr. Tracey to be a co-  
24 author based on his contributions.

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3. Mr. Tracey's Work On The NoPixel Server Does  
Contribute To Audience Appeal Of The Game

Mr. Tracey's contributions to the functionality of the server also unquestionably contributed to the audience appeal of the Game. Without Mr. Tracey's creation of 80% of the back-end code, the in-Game features would simply not function. In fact, as to payment processing alone, Mr. Tracey's contributions to the programmatic payment processing system within the NoPixel Server allowed NoPixel to create and offer more avenues to monetize more in-Game features that players could pay to access and interact with while playing the Game.

Defendants argue that Plaintiff's claim to co-ownership in this case would be the equivalent of a developer of the payment processing system on the Netflix streaming platform claiming co-ownership of the content streamed thereon. Notwithstanding the obvious absurdity of this argument, a developer in such a situation *would* absolutely have a claim to co-ownership of the Netflix software itself, which generates billions of dollars a year in subscription fees from millions of Netflix subscribers. This is probably why Netflix (unlike NoPixel) would never permit any of its software developers who develop source code for it to render any services without signing a written work-for-hire agreement.

**B. Mr. Tracey's Contributions Were Not *De Minimus***

Defendants also argue that Mr. Tracey's contributions to the code base were somehow *de minimus*. But, for the reasons set forth above regarding audience appeal, Defendants have yet to advance a truly logical theory as to why this Court must compare Mr. Tracey's contributions to both the back-end code *and* game code to arrive at a smaller percentage. And *even if* this Court does take Defendants' expert's determination at face value, Defendants cannot cite to a single case supporting their argument that 0.57% is an insufficient contribution under the

1 extremely low bar established by the Court’s “modicum of creativity” standard.  
2 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

3 **C. Regardless Of Whether A Loan-Out Agreement Existed,**  
4 **Defendants Admit That Mr. Tracey Was An Employee Of TOVE**  
5 **And Contributed To The Development Of The Back-End Source**  
6 **Code In The Course And Scope Of Such Employment**

7 Defendants contend that TOVE cannot claim to own the copyright in Mr.  
8 Tracey’s work on the NoPixel Server because “there was never a loan-out  
9 agreement for Mr. Tracey’s services.” However, Defendants provide no authority  
10 requiring such a written agreement, for Mr. Tracey to be loaned-out by TOVE.  
11 Furthermore, the express language of the Employment Agreement between Mr.  
12 Tracey and TOVE actually did permit TOVE to provide Mr. Tracey’s lead  
13 developer services to third parties. UMF at ¶ 4. Accordingly, TOVE owns and can  
14 bring a claim against Defendants for Mr. Tracey’s contributions to the NoPixel  
15 Server rendered in the course of Mr. Tracey’s employment with TOVE.

16 Defendants also curiously deny that they knew of or ever spoke to TOVE  
17 about Mr. Tracey’s loan-out arrangement, despite TOVE providing clear evidence,  
18 to which Defendants have made no objection, that: (1) Mr. Tracey told Defendant  
19 Clout about the arrangement; (2) TOVE issued numerous invoices to Defendants for  
20 Mr. Tracey’s loaned-out services, and (3) Defendant NoPixel initially paid TOVE  
21 on at least some of those invoices. *Id.* at ¶¶ 39-40. Moreover, Defendant Clout  
22 provided a letter of support *to TOVE* acknowledging Mr. Tracey’s services as a  
23 loaned out developer for Defendant NoPixel, which letter TOVE included in  
24 paperwork it submitted to assist Mr. Tracey with his work visa. *Id.* at ¶ 51.

25 Finally, Defendants claim that TOVE’s principal’s submission of a letter in  
26 the H-1B Visa Application setting out Mr. Tracey’s time spent on certain work for  
27 TOVE, while not expressly mentioning a loan-out agreement between TOVE and  
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1 Mr. Tracey, is somehow “binding” on TOVE and means that no loan-out agreement  
2 existed. However, the authority cited by Defendants to support this argument  
3 regards sworn affidavits submitted in opposition to motions for summary judgment  
4 that contradict *prior deposition testimony*. See *Van Asdale v. Int’l Game Tech.*, 577  
5 F.3d 989, 998 (9th Cir. 2009) (“The general rule in the Ninth Circuit is that a party  
6 cannot create an issue of fact by an affidavit contradicting his prior deposition  
7 testimony.”) (internal citations omitted). That is not the case here, and TOVE’s  
8 principal’s deposition testimony did nothing more than clarify terms of the loan-out  
9 arrangement that existed all along between TOVE and Mr. Tracey.

10 Accordingly, because TOVE loaned-out Mr. Tracey to NoPixel, TOVE owns  
11 the contributions to the NoPixel Server rendered in the course of Mr. Tracey’s  
12 employment with TOVE.

13 **D. There was No License for Mr. Tracey’s Developer Services**

14 Finally, Defendants focus on the Terms of Service to argue that Mr. Tracey  
15 granted Defendants a perpetual license in his contributions to the back-end code of  
16 the NoPixel Server. But this argument clearly fails for two reasons.

17 **First**, Defendants ignore Plaintiff’s legitimate contention that the existence of  
18 ambiguities in the Terms of Service regarding whether such Terms applied to Mr.  
19 Tracey’s developer services meant that no meeting of the minds existed to bind Mr.  
20 Tracey thereto. Furthermore, as between Defendants and Mr. Tracey, Defendants  
21 were the drafters of such Terms, and must therefore be held to Mr. Tracey’s  
22 interpretation of what the Terms meant with respect to such ambiguity. California  
23 Civil (“Cal. Civ.”) Code § 1654; *Sands v. E.I.C., Inc.*, 118 Cal.App.3d 231 (1981).  
24 Accordingly, Defendants cannot now argue such Terms of Service bind Mr. Tracey.

25 **Second**, and far more importantly, Defendants ignore the agreement between  
26 Defendant Clout and Mr. Tracey to pay Mr. Tracey \$10,000 in exchange for his  
27 services as a developer on the NoPixel Server. Not only were the terms of this  
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1 agreement new and different than any terms contained in the Terms of Service, **but**  
2 **Defendant Clout also offered to put such terms in a separate writing to**  
3 **memorialize the separate agreement that they were.** This was clearly a separate  
4 agreement for Mr. Tracey's developer services, to which the Terms of Service did  
5 not apply nor are incorporated within. *See* UMF at ¶ 34.

6 **IV. CONCLUSION**

7 Based on the foregoing, TOVE respectfully requests that summary  
8 adjudication be granted as to Plaintiff's First Cause of Action in its FAC for  
9 Declaratory Relief.

10 DATED: August 26, 2024

**ALTVIEW LAW GROUP, LLP**

11  
12 By: /s/ John M. Begakis, Esq.  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing electronically filed document has been served via a “Notice of Electronic Filing” automatically generated by the CM/ECF System and sent by e-mail to all attorneys in the case who are registered as CM/ECF users and have consented to electronic service pursuant to L.R. 5-3.3.

Dated: August 26, 2024

By: /s/ John Begakis  
John M. Begakis